

THE ONTARIO HUMAN RIGHTS CODE,  
S.O. CHAPTER 53, as amended

IN THE MATTER of the complaint made by Susan Donaldson dated July 7, 1989 and amended November 3, 1989 alleging discrimination in employment on the basis of harassment and sexual solicitation by 463963 Ontario Ltd. (carrying on business as) Rainbow Inc. and Mr. George Vacheresse.

A HEARING BEFORE:

Loretta W. Mikus and  
Mary-Woo Sims

Appointed a Board of Inquiry into the above matter by the Minister of Citizenship, the Hon. Elaine Ziemba, to hear and decide the above-mentioned complaint.

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Appearances

Jennifer Scott	Counsel to the Ontario Human Rights Commission
Susan Donaldson	Complainant
George Vacheresse	Respondent and Owner of the respondent Rainbow Inc.

Dates and Place of Hearing: Toronto, Ontario, May 25 and 26, August 9, 1993

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## I. Introduction

This proceeding is an inquiry under the Ontario Human Rights Code, 1981, S.O. 1981, c.53, as amended (the "Code") arising from a Complaint made by Ms Susan Donaldson alleging discrimination in employment on the basis of sexual solicitation, harassment and reprisal by 463963 Ontario Ltd. ( C.O.B. Rainbow Inc.) and George Vacheresse. The respondent Vacheresse is the owner of the respondent corporation Rainbow Inc. Rainbow Inc. operates as a bingo and novelty supplies business in Toronto, Ontario. Ms Donaldson began working at Rainbow Inc. in June of 1987. In the Complaint, Ms Donaldson alleges that Mr. Vacheresse engaged in a number of acts constituting sexual harassment and that subsequent to Ms Donaldson's complaints of harassment, Mr. Vacheresse engaged in acts of reprisal against Ms Donaldson. Ms Donaldson's employment with Rainbow Inc. terminated effective May 25, 1989.

In his defence, the respondent Vacheresse, who represented himself and Rainbow Inc, denied that some of the alleged incidents occurred. With respect to other incidents, it was Mr. Vacheresse's submission that the incident did not occur as described by Ms Donaldson in her evidence or that, when placed in context, the incidents did not constitute sexual harassment. Mr. Vacheresse denied any form of reprisal against Ms Donaldson for having filed a complaint.

It should be noted that although Mr. Vacheresse attended the May 25, 1993 hearing, he had advanced notice of and had previously confirmed his attendance at the hearing date set for August 9, 1993, Mr. Vacheresse failed to appear for the August 9, 1993 hearing date. He therefore did not present final arguments to this Board.

## II. The Facts of the Present Case

The Complaint giving rise to the present inquiry set out a series of allegations concerning the conduct of the respondent Vacheresse during the period from about September 1988 to May 1989. During this period, the complainant, Ms Donaldson, served as an employee of the respondent Rainbow Inc. Mr. Vacheresse is the owner of the respondent Rainbow Inc. Evidence in the form of oral testimony concerning these matters was presented almost exclusively by Ms Donaldson. Evidence concerning Ms Donaldson's reaction to these alleged incidents was provided by Ms Donaldson's psychiatrist, Dr. Clara Pererra. Ms Donaldson's

mother, Marilyn Morris, provided evidence concerning telephone conversations she had with Mr. Vacheresse. As well, several documents of various kinds were filed in evidence in support of various factual propositions asserted on behalf of Ms Donaldson. Mr. Vacheresse, although not represented by counsel during this proceeding, introduced Exhibit 27 a photocopy of an "Answer of the Respondents" as his response to the complaint, participated in the cross-examination of witnesses and introduced some documentary evidence concerning the amount of bonus paid to the complainant in a previous year. Mr. Vacheresse did not present any witnesses himself nor did he make a final summation as he did not attend the final day of hearing.

Mr. Vacheresse's evidence consisted of verbal testimony in response to the complainant's complaint filed with the Ontario Human Rights Commission July 7, 1989 (Exhibit 16) and as amended on November 3, 1989 (Exhibit 2). Mr. Vacheresse also introduced his formal response to the complaint (Exhibit 27) signed by him.

Both the Complainant, Ms Donaldson, and Mr. Vacheresse agreed that they had worked together at Bazaar Novelty previous to working together at Rainbow Inc.

Mr. Vacheresse claimed that Ms Donaldson started employment with Rainbow Inc. on a part-time basis, working 6 p.m. to 9 p.m. three days per week in 1985 (Exhibit 27, para. 5) and subsequently had her hours of work changed in 1986 to those of a full-time employee (Exhibit 27, para.6). Ms Donaldson claimed that her hours were flexible, averaging Monday to Friday from 9 a.m. to about 2 p.m. or 4 p.m. depending upon completion of her work, and every other Saturday. In cross-examination however, Mr. Vacheresse admitted that Ms Donaldson started in 1986 and her hours of work were changed in 1987. Ms Donaldson's hours of work are at issue here as Ms Donaldson claimed that subsequent to her having rejected Mr. Vacheresse's advances, he changed her hours of work.

Mr. Vacheresse described his relationship with Ms Donaldson as personal and friendly. In Exhibit 27 and in oral evidence stated that he was a "personal friend of the Complainant preceding her employment with Rainbow". According to Mr. Vacheresse the personal and friendly nature of the relationship continued through Ms Donaldson's employment with Rainbow Inc. However, Mr. Vacheresse later contradicted his view of the relationship when in testimony he agreed to paragraph 2 of Ms Donaldson's complaint describing their relationship as "a

business relationship". Ms Donaldson described their relationship at both Bazaar Novelty and Rainbow Inc. as that of a business relationship. She felt that they had a good working relationship.

Both parties agreed that Ms Donaldson's duties included serving customers, ordering, costing of supplies, paying bills, inventory control, collecting overdue accounts and more or less running the store as Mr. Vacheresse made deliveries and when in the store, he would also serve customers.

Both parties agreed that about September 1988, Mr. Vacheresse went to Ms Donaldson's apartment. Ms Donaldson's boyfriend, Bill Landry was visiting her. Ms Donaldson refused to let Mr. Vacheresse enter the apartment. During this exchange, Ms Donaldson stated that Mr. Vacheresse saw Bill Landry in the apartment and screamed at her to "kick the bum out". In responding to this allegation, Mr. Vacheresse admitted that he stated to the complainant "if you have any sense, you will kick that bum out". Ms Donaldson stated that shortly after this incident, Mr. Vacheresse proposed marriage to her and she refused. Ms Donaldson stated that the combination of these two events led her to take two weeks off work. She said she felt that she had a business relationship with Mr. Vacheresse and was taken aback by his behaviour at her apartment and subsequent marriage proposal.

Mr. Vacheresse stated that the marriage proposal as referred to in the first sentence in paragraph 4 of exhibit 2 never happened. The sentence reads: "George Vacheresse later called me and told me that he loved me and wanted to marry me". However, in Mr. Vacharesse's response to the complaint, Exhibit 27, paragraph 26, it states "... Vacharesse admits that he asked the complainant to marry him in September 1988...". Further, in cross-examination, Mr. Vacharesse again contradicted himself by agreeing that he proposed marriage to the complainant.

When Ms Donaldson returned to work, she alleged that Mr. Vacharesse continued his proposals for marriage in spite of her consistent refusals. She stated that Mr. Vacharesse proposed marriage and asked her to save money for an engagement ring offering "\$4,000 to buy a ring, or a new car and a vacation if only I would marry him" (Exhibit 2, para 5). Mr. Vacharesse agreed that he offered to buy a ring, but that there were no conditions of marriage

attached to the ring. He denied that there was an offer of a new car or a vacation. In cross examination with respect to his offer of \$4,000 for the ring as part of a proposal for marriage, Mr. Vacheresse responded that he asked Ms Donaldson to make up her own mind about the use of the money.

This Board of Inquiry finds the complainant's allegation that Mr. Vacharesse continuously proposed marriage to her more credible given the prior contradictions in Mr. Vacharesse's responses to Ms Donaldson's complaint.

Ms Donaldson claimed that her hours of work were changed as a result of her rejections of Mr. Vacharesse's proposals. Ms Donaldson stated that in 1986, she did some bookkeeping work for Mr. Vacharesse, but did not commence regular employment with Mr. Vacharesse until June 1987. When she started, her hours were more flexible, averaging Monday to Friday from 9 a.m. to about 2 p.m. or 4 p.m. depending upon completion of her work and every other Saturday. In the fall of 1988, and as a result of her rejections of Mr. Vacharesse's advances, Ms Donaldson claims that her hours were changed.

Mr. Vacheresse's evidence with respect to Ms Donaldson's start date, hours of work and days of work were contradictory. Mr. Vacharesse changed his evidence as to Ms Donaldson's start date of 1985 to 1986 when referring to exhibit 27, para. 5. Mr. Vacheresse also changed the in which Ms Donaldson is supposed to have started full-time employment from 1986 to 1987 when referring to exhibit 27, para.6. Mr. Vacheresse in his response to para.6, exhibit 27, and subsequently amended in testimony, stated that the complainant commenced full time employment, working 9 a.m. to 5 p.m., Monday to Saturday. However, in responding to Ms Donaldson's complaint (Exhibit 2, para 1) Mr. Vacheresse stated in testimony that although the hours of work referred to were incorrect, it was true that Ms Donaldson worked every other Saturday.

Mr. Vacharasse failed to produce any evidence to contradict Ms. Donaldson's recollection of her original hours of work and subsequent change in hours. In fact, Mr. Vacharesse in testimony contradicted his own written response to the complaint concerning hours of work. This Board finds the complainant's version of events to be more credible than that of the respondent.

Ms Donaldson stated also that upon her return to work, Mr. Vacharesse would poke her and tease her by sticking price tags on her while she was in the office (Exhibit 2, Para.5). In testimony, Ms Donaldson alleged that while she was opening a safe, Mr. Vacharesse had said "I'd like to jump you" and that he would brush up against her. Ms Donaldson states that when she told him to stop, he didn't see anything wrong with what he was doing. Mr. Vacharesse responded that he had stuck price tags on her hand as she had the only garbage can and he only gave her the stickers to throw in the garbage. Mr. Vacharesse admitted to having touched Ms Donaldson occasionally but it was because they were in tight quarters. Mr. Vacharesse stated that his hands never touched Ms Donaldson and if he bumped into her, it was not on purpose. He has sometimes bumped into customers. Exhibit 27, Para. 27, states: "...the respondent Vacharesse admits that he may have touched the Complainant occasionally but never intended or considered this contact to be a sexual advance, but informal personal interaction between close friends who were working together. At no time did the Complainant ever indicate to the Respondent Vacharesse that he was sexually harassing her and the Respondent never touched her in a manner which was sexually suggestive". Mr Vacharesse earlier had contradicted his earlier submission that a personal relationship existed between him and Ms Donaldson. He further contradicted his testimony concerning the proposal of marriage and the complainant's hours of work. In this instance, this Board finds Ms Donaldson's version of events to be more credible.

Ms Donaldson stated that Mr. Vacharesse had promised her a Christmas bonus of \$5,000. She claimed that Mr. Vacharesse had told her that the bonus was appropriate as the business had been successful and they had both worked hard to achieve that success. Ms Donaldson claimed that after she rejected Mr. Vacharesse's advances, she did not receive any bonus in 1988. Mr. Vacharesse introduced evidence that in 1986 Ms Donaldson received a bonus of \$200 (Exhibit 23) and that in 1987, Ms Donaldson received a bonus of \$1,000 (Exhibit 22). He adamantly rejected and denied that a bonus of \$5,000 had been promised to Ms Donaldson. He did not, however, state that no bonus had been discussed.

In Mr. Vacharesse's previous responses to allegations, he contradicted himself and failed to present any evidence to refute the allegations. However, in this instance, Mr. Vacharesse was not only adamant and concise, he presented evidence concerning the past amounts of bonus that had been given to Ms Donaldson. Although this Board has accepted the complainant's evidence over Mr. Vacharesse's in each prior instance, in this one, the Board accepts the evidence of Mr.

Vacheresse that a bonus in the amount of \$5,000 had not been promised to the complainant.

Ms Donaldson stated that in December 1988, as a result of Mr. Vacheresse's treatment of her, she saw her family doctor and was advised to stay off work. While off work, the complainant alleges that Mr. Vacheresse called her at home continuously and that when she stopped answering his calls, he would call her mother or her sister. Mr. Vacheresse also sent her flowers and cards on numerous occasions and parked outside her apartment building or circled the area. Ms Donaldson alleged that all of these incidents constitute sexual harassment. Ms Donaldson stated that in February 1989, the police were asked to intervene to advise Mr. Vacheresse to stop sending flowers and cards.

Mr. Vacheresse, in testimony responding to Ms Donaldson's allegations concerning the telephone calls, denied that he continuously called Ms Donaldson or her mother but admitted to having called Ms Donaldson's sister to find out if Ms Donaldson was okay and asking when she could come back to work. In his response to the complaint, exhibit 27, para. 28, he admitted only to having called the complainant's mother. Marilyn Morris, the complainant's mother testified that Mr. Vacheresse called on more than one occasion about the summer of 1989 asking for her daughter. Mr. Vacheresse contradicted himself on the matter of phone calls he had made to Ms Donaldson's family.

With respect to Ms Donaldson's allegation that Mr. Vacheresse was in his car which was parked outside her apartment building or circling the area, Mr. Vacheresse responded in testimony that this was false and that if he was in the area, it was because he was on business and only business. He further said that he had been there before and since a hundred times. Ms Morris testified that she saw Mr. Vacheresse on at least three occasions in 1989 around Ms Donaldson's residence. Mr. Vacheresse and Ms Donaldson both acknowledge that Mr. Vacheresse sometimes delivered supplies in the area.

Mr. Vacheresse admitted to having sent Ms Donaldson flowers and cards. He denied that sending flowers and cards amounts to sexual harassment. In a letter dated February 8, 1989 (Exhibit 6) written by Mr. Vacheresse to the complainant he stated that "you did not want my affections and that sending you flowers is considered by you as harassment." Subsequent to sending that letter, Mr. Vacheresse admitted to having sent a get well card in April 1989, a

belated birthday card and delivered flyers to Ms Donaldson.

Ms Donaldson alleged that after Mr. Vacheresse found out that she had filed a complaint with the Ontario Human Rights Commission, Mr. Vacheresse sent her correspondence (Exhibit 17) which she felt constituted a reprisal contrary to section 8, formerly section 7 of the Ontario Human Rights Code. Ms Donaldson stated that an offer of settlement was made to Mr. Vacheresse on her behalf by the Human Rights Officer handling her case. The proposed amount of settlement was \$10,000. The complainant referred to Exhibit 17 which consists of a card which shows a caricature of a person blindfolded and tied to a stake with guns pointing at the person. Sent with the card, was ten "one thousand lucky bucks". The act of reprisal or threat of reprisal in Ms Donaldson's view consisted of a card with \$10,000 in "funny money" (Exhibit 17) which she believes was sent by Mr. Vacharesse. Ms Donaldson said that the writing on the envelope appeared to be the same writing as Exhibit 15 which Mr. Vacharasse had admitted to sending. Further, the cards and the "funny money" was sold at Rainbow Inc. Ms Donaldson stated that when she received the card, she interpreted the card to mean that she was "the person tied up in front of the firing squad". She thought "the \$10,000 in funny money was all I was getting or I'm dead." She took the card to 12 Division because she was worried "about what a card like this meant".

Mr. Vacharasse denied having sent the card, but admitted that the "funny money" was sold in his store. He acknowledged the writing was close to his writing but not the same.

The Board asked Commission Counsel to present argument as to why evidence concerning settlement discussions should be admissible given that these discussions are generally privileged and protected from disclosure. Commission Counsel argued that there are exceptions to the privilege. Commission Counsel put forward the position that the settlement discussion is relevant to the allegation of reprisal by Mr. Vacharesse against Ms Donaldson. The settlement had relevance apart entirely from any force it may have as an admission against interest by Mr. Vacharesse in the complaint of sexual harassment. Commission Counsel cited the case of *Mueller Canada Inc. v State Contractors Inc. et al.* (Ontario Reports, 71 O.R. (2d) page 401, para. g & h) which involved the production of a settlement letter when settlement discussions are generally protected from disclosure. High Court Justice J. Doherty allowed the settlement to be produced stating:

"...there are exceptions to the privilege which operates where one of the parties to the negotiations, or a stranger to those negotiations, seeks production. In discussing those exceptions, Sopinka and Lederman, *op. cit.*, at p.201 in *I. Waxman and Sons Ltd. v. Texaco Canada Ltd.*, say:

The aforesaid exceptions to the rule of privilege find their rationale in the fact that the exclusionary rule was meant to conceal an offer of settlement only if an attempt was made to establish it as evidence of liability or a weak cause of action, not when it is used for other purposes.

The reference to establishing "liability or a weak case" must refer to liability in relation to the matters which are the subject of the settlement - in this case the alleged wrongs which led to the initial dispute between State and the Kellogg Companies. Where documents referable to the settlement negotiations or the settlement document itself have relevance apart from establishing one party's liability for the conduct which is the subject of the negotiations, and apart from showing the weakness of one party's claim in respect of those matters, the privilege does not bar the production."

Mr. Vacharesse did not object to the introduction of settlement discussions at the hearing and as a result, this evidence was admitted. Based on previous inaccuracies and contradictions of Mr. Vacharesse's evidence, the Board concludes that Mr. Vacharesse did in fact send the card and funny money.

Since December 1988, Ms Donaldson has been off work and was seen by her physician and subsequently, Dr. Clara Perrera, a psychiatrist. Dr. Perrera testified that when Ms Donaldson was seen by her in February 1989, she complained of anxiety, depression, difficulty sleeping, loss of appetite and abdominal pain. Ms Donaldson received counselling and medication for her condition. Ms Donaldson was subsequently referred to a Day Hospital Program at the Humber Memorial Hospital in March/April 1989. Ms Donaldson's employment with Rainbow Inc. was terminated effective May 25, 1989 by letter, May 1, 1989 (Exhibit 13).

In summary, the facts of this case are as follows: Mr. Vacharesse continuously proposed marriage to Ms Donaldson in spite of her rejections. Ms Donaldson's rejections of Mr. Vacharesse resulted in him changing her hours of work. Mr. Vacharesse admitted to touching the complainant at work even though he claimed it was inadvertent. He admitted to sending flowers and cards to the complainant even after the police had advised him that the complainant considered these actions to amount to harassment. Mr. Vacharesse continuously called the complainant when she was off work and when that proved unsuccessful, he attempted to reach her through her family. The evidence showed that Mr. Vacharesse wanted to marry Ms Donaldson and he did not react well to her rejections.

### III. Findings with Respect to Liability

The legal framework set out in the Ontario Human Rights Code applicable to Ms Donaldson's complaint, may be stated fairly briefly; dealing explicitly with sexual harassment is section 7(2), formerly section 6(2) of the Code which states:

7(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee."

The concept of harassment is defined in the following manner in section 10(f), formerly section 9 (f) of the Code:

10(f) "harassment" means engaging in a course of vexatious comment of conduct that is known or ought reasonably to be known to be unwelcome."

Section 7(3) formerly section 6(3) of the Code states:

7(3). Every person has a right to be free from,

(a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to

know that it is unwelcome; or

(b) a reprisal or a threat of a reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

Ms Donaldson has also alleged a breach of section 8, formerly section 7 of the Code occurred. Section 8 of the Code states:

8. Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.

The definition of sexual harassment that was first adopted by Professor Peter Cummings in *Olarte et al. v. Commodore Business Machines Ltd.* (Ont. 1983), 4 C.H.R.R. D/1075. The definition is as follows:

unwanted sexual attention of a persistent or abusive nature, made by a person who knows or ought reasonably to know that such attention is unwanted.

To constitute a breach of section 7(2) there must be a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome (*Cuff v Gypsy Restaurant* (1987), 8 C.H.R.R. D/3927 (Ont. Bd. of Inq.) at D/3980, para 31525).

On the basis of the findings of fact as stated above, this Board finds that Mr. Vacharesse engaged in a course of vexatious comment or conduct that he knew or ought reasonably to have known to be unwelcome. It is clearly established, in this Board's view, that Mr. Vacharesse was in breach of section 7(2) of the Code.

Did Mr. Vacharesse violate section 7(3) (a) & (b)? Mr. Vacharesse is the owner of Rainbow Inc. and was clearly a "person in a position to confer, grant or deny a benefit or advancement" to Ms Donaldson. Did Mr. Vacharesse make a solicitation or advance towards Ms

Donaldson? Mr. Vacharesse made continuous proposals of marriage which in the view of this Board is a solicitation and an advance. Mr. Vacharesse changed Ms Donaldson's hours of work after she rejected his proposals. Ms Donaldson did not receive a Christmas bonus which she had received in the previous two years. This Board finds that Mr. Vacharesse violated section 7(3)(a) & (b) of the Code.

Did Mr. Vacharesse violate section 8 of the Code? Section 8 deals with complaints of reprisal. The Collins Pocket Dictionary's definition of reprisal is: injury done in return for injury received. The Oxford Concise Dictionary definition is: act of retaliation.

Ms Donaldson alleged that Mr. Vacharesse engaged in an act of reprisal against the complainant after he was contacted by the Ontario Human Rights Commission's Officer regarding settlement discussions. The complainant referred to Exhibit 17 which consists of a card which shows a caricature of a person blindfolded and tied to a stake with rifles pointing at him/her. Sent with the card, was ten "one thousand lucky bucks". The act of reprisal or threat of reprisal in Ms Donaldson's view consisted of a card with \$10,000 in funny money (Exhibit 17) sent by Mr. Vacharesse. Ms Donaldson stated that when she received the card, she interpreted the card to mean that she was "the person tied up in front of the firing squad". She thought "the \$10,000 in funny money was all I was getting or I'm dead". Ms Donaldson took this incident so seriously as to report it to 12 Division of the Metropolitan Toronto Police. It did not deter from pursuing the complaint. This Board has already decided that in spite of Mr. Vacharesse's denials, on the balance of probabilities, he did send the card. His intentions in sending the card could be subject to many interpretations; however, that is not the question which this Board has to answer.

The question is whether or not the card and the funny money constitute reprisal contrary to Section 8 of the Code. The card shows a caricature of a person blindfolded with rifles pointed at him or her. \$10,000 was the amount discussed with Mr. Vacharesse as a possible settlement of the complaint. There is no doubt that Ms Donaldson found the card to be a threat. Was her reaction reasonable in light of the content of the card? In order to determine the answer to this question, this Board first examined the concept of "reasonable person" as previously used in decisions concerning sexual harassment.

The concept of the "reasonable person" in sexual harassment cases surfaced when Boards introduced the element of constructive knowledge on the ground that "a reasonable person" should have known that the behaviour was unwelcome. Kathryn Abrams writing in the Vanderbilt Law Review, in an article entitled "Gender Discrimination and the Transformation of Workplace Norms" (Vol. 42:1183) 1202 says:

(U.S.) Courts strive for a more "objective" viewpoint by subordinating the "subjective" view of the plaintiff to some other standard. Some courts compare the reaction of the plaintiff with the perspective of the "hypothetical reasonable person" (*Rabidue v Osceola Ref. Co.*, 805 F. 2d 611 [6th Cir.1986]). Other courts replace the "reasonable person" with the "reasonable woman" (*Rabidue*, 584 F. Supp. at 433), yet fail to denominate the difference between the two. Still others consult the perspective of the reasonable woman as well as the actual intention of the employer (*Yates v. Avco Corp.*, 819 F.2d 630, 636 [6th Cir. 1987]). Each of these approaches illustrates the difficulties courts have had in understanding how sexual harassment affects working women. Adopting the perspective of the hypothetical reasonable person assumes that there is some view of sexual harassment that we are all likely to share, once we set aside the over reaction of the victim. It is a stark denial of a range of social facts that make sexual harassment a distinctly different experience for women than would be for men. Even a reasonable woman standard, when it is not carefully elaborated by a discussion of the differences between men and women, may reflect less an effort to see beyond the male perspective, than an attempt to evoke a woman who is, in Henry Higgins's words, "more like a man." Reliance on the intent of the employer misses the crucial point that even an employer who regards such exchanges as harmless "business as usual" can create an environment that is nightmarishly oppressive to his female employees.

In *Ellison v. Brady* (U.S. 924 F. 2d 872 (1991), 54 FEP Cases [BNA] 1346 [January 23, 1991]), the court rejected the gender-neutral "reasonable person" standard, finding that it "tends to be male-biased and tends to systematically ignore the experiences of women". The court held that the harassing conduct must be evaluated from the perspective of the victim. "Because women are disproportionately victims of rape and sexual assault, women have a

stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to a violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the underlying threat of violence that a woman may perceive."

Was Ms Donaldson's reaction to the card, a feeling of being threatened and a belief that it constituted an act of retaliation reasonable? Has Mr. Vacheresse violated section 8 of the Code?

At the time Ms Donaldson received the card in question, she had been terminated from employment by Mr. Vacheresse. She had been subjected to harassment in the form of phone calls and visits to her home by Mr. Vacheresse. She had received flowers and cards from Mr. Vacheresse and even after the police had advised Mr. Vacheresse that Ms Donaldson considered those actions to be harassment, he continued to send her cards. Ms Donaldson was receiving treatment at the Humber Memorial Hospital. Ms Donaldson filed a complaint with the Ontario Human Rights Commission and the Human Rights Officer commenced settlement discussions with Mr. Vacheresse. Shortly after the discussion of \$10,000 as a settlement amount, Ms Donaldson received a card which showed a caricature of a person blindfolded and tied to a stake with rifles pointing at him/her. Sent with the card, were ten "one thousand lucky bucks". Ms Donaldson stated that when she received the card, she interpreted the card to mean that she was "a person tied up in front of the firing squad". She thought "the \$10,000 in funny money was all I was getting or I'm dead". Ms Donaldson took this incident so seriously as to report it to 12 Division of the Metropolitan Toronto Police.

In light of the above, this Board finds that Ms Donaldson's reaction to the card is understandable and reasonable in light of Mr. Vacheresse's persistent harassing behaviour. This Board finds that Mr. Vacheresse had violated Section 8 of the Code.

#### IV. Remedies

A series of contraventions of the Code have occurred in the present case. This Board now turns to the question of fashioning an appropriate remedy. The remedial provisions of the Code applicable to the present case are set out in the following terms in section 40 (1) now 41(1).

41.-(1) Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 9 by a party to the proceeding, the board may, by order,

(a) direct the party to do anything that, in the opinion of the board, that party ought to do to achieve compliance with this Act, both in respect of the complainant and in respect of future practices; and

(b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding \$10,000, for mental anguish.

Section 41(1) of the Code grants a Board extensive remedial powers for infringement of the Code. This includes the power to order restitution for loss arising out of infringement. Restitution in the context of loss of employment means the complainant should be placed in the position she would have been in, if she had not suffered the violation of her rights under the Code. The Board should, however, take into account the duty of the complainant to mitigate her losses.

The complainant testified that her salary was \$523.00 per week and that she received sick pay from March 16, 1989 to May 25, 1989, at a reduced rate of \$190.00 per week. She testified that she actively sought employment from that time and started working on a temporary basis beginning October 19, 1989. For damages resulting from lost wages this Board awards a total of \$13, 790.00.

This Board now turns to the matter of the 1988 bonus. There was conflict between the complainant and the respondent over what amount of bonus was promised to the complainant. The complainant alleged that the amount of \$5,000.00 was promised to her. The respondent vehemently denied this and presented evidence respecting previous bonus payments. This Board is satisfied that the amount of \$5,000.00 was not promised the complainant, but a 1988 bonus was discussed between the complainant and the respondent. In determining the amount of the

1988 bonus, this Board referred to the evidence that in 1987, the complainant received a bonus of \$1,000.00. Other than the complainant's testimony, which has been found in this instance not to be reliable, that the amount of bonus promised was \$5,000.00 no evidence was presented to support her claim. Given that the previous year's bonus was \$1,000.00, this Board awards an additional \$1,000.00 covering the 1988 bonus.

Commission Counsel has asked for interest on loss of earnings calculated to the end date of hearings into this case by this Board (August 11, 1993). This Board has declined to calculate interest to the end date suggested as it is not the respondent's fault that it took over three years for the complaint to get to this Board. Interest calculations will be based solely upon when the complainant lost her income to the date when she gained employment. This Board's calculations are as follows:

Principal Sum	Start Date	End Date	No. of Days	Rate	Interest Amount
\$ 3,330	Mar. 16, 1989	Oct. 16, 1989	150	14%	\$192.00
\$10,460	May 25, 1989	Oct. 16, 1989	100	14%	\$402.00
\$ 1,000	Jan. 1, 1989	Oct. 16, 1989	205	14%	\$ 79.00

This Board determines that the total amount of special damages for lost wages amount to \$14,463.00.

Section 41(1)(b) also permits the assessment of general damages for mental anguish. Several factors are relevant to determining the award for mental anguish.

In *Shaw v Levac Supply Ltd.* (1991), 14 C.H.R.R. D/36 (Ont. Bd. Inq.) at D61-62 citing *Torres v. Royalty Kitchenware Ltd.* (1982), 3 C.H.R.R. d/858 (Ont. Bd. Inq) these factors were stated as follows:

- (1) The nature of the harassment, that is, was it simply verbal or was it physical as well?
- (2) The degree of aggressiveness and physical contact in the harassment;
- (3) The ongoing nature, that is, the time period of the harassment;
- (4) The frequency of the harassment;

- ( 5 ) The age of the victim;
- ( 6 ) The vulnerability of the victim; and
- (7) The psychological impact of the harassment upon the victim.

The reason why general damages for mental anguish are particularly merited in this case is because the facts indicate that all the elements listed in the *Torres* case.

The respondent's behaviour that has been found in violation of the Code was both verbal and physical. The respondent continuously asked the complainant to marry him in spite of her objections. The respondent touched and poked the complainant while at work. The harassing behaviour of the respondent was aggressive and involved persistent and frequent unwelcome physical contact. The harassment took place even after the complainant had booked off on sick leave and even after the respondent became aware that the complainant was being counselled by a psychiatrist. This Board has also found that the respondent engaged in an act of reprisal which placed the complainant in a state of fear. For these reasons, this Board awards \$5,000.00 to the complainant for mental anguish; however this Board declines to award any interest related to general damages.

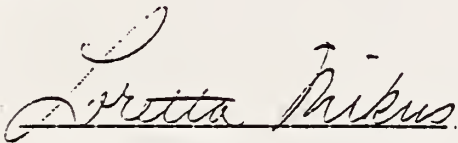
Finally, this Board orders the respondent to attend a training session on human rights and sexual harassment organized by the Ontario Human Rights Commission. The respondent must also post the preamble and Sections 5, 7 and 9 of the Ontario Human Rights Code in the business premises where he operates.

V. Order

It is ordered that:

- ( 1 ) The respondent pay Ms Donaldson special damages in the amount of \$14,463.00 for lost wages.
- ( 2 ) The respondent pay Ms Donaldson the sum of \$5,000 for mental anguish as a result of discriminatory behaviour in violation of the Ontario Human Rights Code.
- ( 3 ) The respondent attend a training session on human rights and sexual harassment organized by the Ontario Human Rights Commission. The respondent must also post the preamble and Sections 5, 7 and 9 of the Ontario Human Rights Code in the business premises where he operates.

Dated the 14th day of January , 1994 in the City of Toronto.



Loretta W. Mikus



Mary-Woo Sims

